Stevens International, Inc. *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, and its Local Union No. 1688, UAW. Case 9–CA–36335

December 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On September 7, 1999, Administrative Law Judge Richard H. Beddow, Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

We agree with the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by, inter alia, failing to give the Union an opportunity to bargain concerning the Respondent's decision to transfer unit work to nonunit supervisors.

The Respondent and the Union were parties to a collective-bargaining agreement, which had been extended by the parties through July 1998.[1] The Respondent had employed between 100 and 200 production and maintenance employees, but by the end of June 1998, there were only 11 unit employees remaining. On June 30, the Respondent notified these employees in writing that they were to be laid off effective July 2. At the time of the layoff, unit employees were loading and preparing parts, plant fixtures, and equipment for shipment to the Respondent's facility in Texas as well as continuing to perform their normal duties of inspecting and shipping parts and performing maintenance work as needed. On June 29, the union committee met with Bill Kist, the Respondent's management official. Kist informed the Union of the layoff. During this conversation, the Union's vice president, William Stevison, told Kist that there was a good amount of work left and asked who was going to do the work. Kist replied by listing some supervisors' names. The Union filed a grievance on July 3, which the Respondent denied on July 9. On or about July 20, the Union visited the plant, and observed that machinery parts previously packed for shipment by unit employees had been moved in preparation for shipment.[2]

While our dissenting colleague is correct that the collective-bargaining agreement gives the Respondent the right to assign work, the contractual language also clearly provides that such assignments will be made only to "employees." The Respondent and our dissenting colleague rely on article 3, entitled "Management Rights," which provides in relevant part that the Respondent has "the right to assign work and maintain performance records for all *employees*"[3] (emphasis added). Article 1 of the contract, however, defines the term "employee" as including all production and maintenance employees and categorically excludes, inter alia, supervisors.[4] There is no provision that gives the Respondent the right to assign unit work to supervisors. Therefore, by the terms of the contract the Respondent's right to assign work was limited to assignment of work to employees.[5] Certainly, under these provisions, there is no basis for finding that the Union waived its right to bargain under the Board's "clear and unmistakable" waiver standard. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693,

[1] Unless otherwise indicated, all dates are in 1998.

[2] The Union immediately requested information regarding the work performed after July 2, including receiving records and pulling parts in preparation for shipment and the duties of management personnel still at the plant. The Respondent refused to provide any of this information until it became part of the information provided for the hearing in this case. We agree with the judge that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to timely provide the requested information.

[3] Art. 3, secs. 1–3 read in full:

> Management
>
> Management's Rights
>
> Section 1. All rights to the Company existing before the execution of this Agreement are retained by the Company, except as expressly modified by this Agreement.
>
> . . . .
>
> Section 3. The rights referred to in Section 1, above, also include, but are not limited to, the following: . . . .the right to assign work and maintain performance records for all employees . . . .

[4] Art. 1 reads in full:

> Definition of Employee
>
> The term "employee" as used in this Agreement shall include all production and maintenance employees, including plant clerical employees, employed by the Company at its plants located at 851 Walnut Street, Hamilton, Ohio, the Ninth Street Annex (located at 928 South Ninth Street, Hamilton, Ohio); and 2175 Schlicter Drive, Hamilton, Ohio, excluding all office clerical employees, technical employees, time study employees, guards, professional employees and supervisors as defined in the National Labor Relations Act, as amended, constituting the bargaining unit certified by the National Labor Relations Board on March 9, 1972, in Case No. 9-RC-9398.

[5] Our dissenting colleague argues, inter alia, that the Union's failure to note this precise language undermines its meaning as limiting the Respondent's right to assign unit work. The Union did not file a brief to the Board. However, it did file a *contractual* grievance which asserted that the Respondent violated the collective-bargaining agreement by its extra-unit assignment. That contention indicates that the Union was of the view that the assignment was not privileged by the management-rights clause.

708 (1983).[6] Consequently, we find that the unilateral assignment of the unit work to supervisors violated Section 8(a)(5) and (1) of the Act.

Nor do we find the work assignment to be within the purview of the agreement's "zipper clause" (art. 31, sec. 3), which provides that "neither party, for the duration of the Agreement, will be required to bargain collectively with respect to any subject or matter referred to, or covered in this Agreement." Moreover, since we find the Respondent's pre-expiration unilateral work assignments unlawful, we find it unnecessary to reach our colleague's contention that the Respondent's post-expiration assignments were privileged as part of the pre-expiration "status quo." Of course, under our analysis, the Respondent's unilateral assignments continued to be unlawful after the expiration of the collective-bargaining agreement.

We agree with the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union over the effects of its decision to close its Hamilton, Ohio facilities. Accordingly, we shall amend the judge's remedy to provide for the Board's standard backpay remedy in effects bargaining cases as modeled after the remedy set forth in *Transmarine Navigation Corp*., 170 NLRB 389 (1968).[7]

AMENDED REMEDY

Add the following after the third paragraph.

We shall also accompany our order to bargain over the effects of its decision to close its Hamilton, Ohio facilities with a limited backpay remedy as modeled after the remedy set forth in *Transmarine Navigation Corp*., 170 NLRB 389 (1968). Thus, the Respondent shall pay laid-off employees backpay at the rate of their normal wages when in the Respondent's employ, from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of its Hamilton, Ohio facilities; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union;[8] or (4) the Union's subsequent failure to bargain in good faith, but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the unit employees were laid off as a result of Respondent's closing its Hamilton, Ohio facilities, to the time they secured equivalent employment; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the terminated employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance *with F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Stevens International, Inc., Hamilton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (b).

"(a) Furnish the information requested by the Union on August 13, 1998; on request bargain in good faith with the Union as the exclusive bargaining representative of the appropriate unit of its employees with respect to the assignment of unit work involving plant closure functions and with respect to the effects on its unit employees of its decision to cease operations at its Hamilton, Ohio facilities; and on request, embody in a signed agreement any understanding reached.

"(b) Make whole any unit employees who were deprived of the opportunity to perform unit work during the closing down of the Hamilton, Ohio facilities, for all losses incurred as a result of the unlawful assignment of work to nonunit employees, with interest."

2. Insert the following as paragraphs 2(c) and (d) and reletter the subsequent paragraphs.

"(c) Pay employees who were laid off as a result of the Respondent's decision to close its Hamilton, Ohio facilities their normal wages when in the Respondent's employ from 5 days after the date of this decision until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of its Hamilton, Ohio facilities; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith, but in no

[6] Since the Respondent's right to assign work is limited to assignments to employees, we find that even under the "contract coverage" test applied by our dissenting colleague, the Respondent's unilateral assignment is unlawful.

[7] We have also modified the judge's recommended Order and notice to conform to the Board's standard remedial language.

[8] See *Melody Toyota*, 325 NLRB 846 (1998).

event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the unit employees were laid off to the time they secured equivalent employment elsewhere; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ, with interest.

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN HURTGEN, concurring and dissenting in part.

I agree with the judge that the Respondent violated Section 8(a)(5) by refusing to provide the Union with requested information. I also agree with the judge, albeit for different reasons, that the Respondent violated Section 8(a)(5) by failing to bargain with the Union over the effects of its decision to close its Ohio facilities. I do not agree that the Respondent violated Section 8(a)(5) by failing and refusing to bargain with the Union over the assignment of unit work to supervisors.

The relevant facts are fully set forth by the judge. Briefly, the Respondent and Union were bound to a collective-bargaining agreement, which expired on July 19, 1998. Article 3 of that agreement (the management-rights clause) sets forth a broad array of management rights. The text is set forth below. The contract provided that these management rights were not subject to the contractual grievance procedure. Article 31, section 3 of the same agreement (the "zipper" clause) specified that:

> [N]either party, for the duration of the Agreement, will be required to bargain collectively with respect to any subject or matter referred to, or covered in this Agreement even though such subjects or matters may or may not have been proposed, considered, or contemplated by either or both of the parties at the time this Agreement was negotiated and signed.
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> . . . .
>
> When this Agreement, or any renewal thereof, terminates as provided, all rights, duties and obligations created thereunder shall also immediately terminate.

The Respondent operated three facilities in the Hamilton, Ohio area. After a period of sustained losses, during which its work force decreased from 100–200 employees to 11, the Respondent sold two of these facilities and notified the Union on June 30, 1998, that it was laying off its remaining 11 unit employees. This layoff was to take effect on July 2, 1998. In response to the Union's inquiry as to who would continue to perform the remaining unit work, the Respondent said that supervisors would perform it. The Union filed a grievance claiming that this assignment of unit work violated article 2 (the recognition clause) and other provisions. The Union also requested information as to what unit work was performed after the July 2 layoff. This information was not provided.

On July 19, the collective-bargaining agreement expired. Following this expiration, the unit work continued to be assigned to supervisors.

Beginning on August 13, the Union made several proposals for a plant closing agreement, which the Respondent rejected.

The judge found that the Respondent violated Section 8(a)(5) by failing to provide the Union with requested information. He additionally found that the Respondent violated Section 8(a)(5) by unilaterally reassigning unit work to supervisors, following the July 2 layoff of unit employees, and by failing and refusing to bargain over the effects of its decision to lay off unit employees. As to the unilateral work reassignment, the judge found that the Respondent violated Section 8(a)(5) because that assignment impacted unit work and, thus, was a mandatory subject of bargaining.

The Respondent excepts to these findings. As to the latter two, the Respondent argues, among other things, that it had no obligation to bargain over the effects of its closing of the Hamilton operation or of its assignment of unit work to nonunit personnel because its actions were privileged by provisions in the collective-bargaining agreement. *NLRB v. Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993). Specifically, the Respondent contends that article 3 of the agreement (the management-rights clause) specifies that it has the right to lay off, curtail, or terminate its operations as well as the right to assign work. The Respondent further contends that its position is supported by article 31, section 3 (the "zipper" clause).

In response to the Respondent's exceptions, the General Counsel relies on the judge's "mandatory subject of bargaining" analysis, and contends that "Respondent's argument that it had a right to subcontract the work under

the management-rights clause of the contract avoids the issue."

Assignment of Unit Work to Supervisors

I find merit to the Respondent's exception concerning the right to assign work to supervisors. I agree with the Respondent that the "contract coverage" analysis, as set forth by the D.C. Circuit in *NLRB v. Postal Service*, supra, is the appropriate test, rather than the "clear and unmistakable waiver" analysis, for determining whether the Respondent was obligated to bargain over this subject. See, e.g., *Mt. Sinai Hospital*, 331 NLRB 895 (2000) (dissenting opinion). In my view, article 3 makes it plain that the Respondent was lawfully entitled to assign work as it chooses. Thus, on or about July 2, i.e., during the contract term, the Respondent lawfully assigned unit work to its supervisors.

My colleagues contend that article 3 does not privilege the Respondent's assignment of unit work to supervisors under the "contract coverage" test. They assert that article 3 permits the Employer to assign work only among its bargaining unit employees. I cannot agree. Article 3, in its entirety, specifies that:

> The rights referred to in Section 1, above, also include, but are not limited to, the following: The right to maintain order, economy and efficiency; the right to extend, maintain, curtail or terminate the business or operations of the Company; the right to subcontract work; the right to determine the size, kind and location of the Company's business or operations, and to determine the type and amount of products to be manufactured and equipment to be used; the right to determine production and work schedules, methods and processes and means of manufacture and materials to be use, including the right to introduce new and improved methods or facilities; *the right to assign work* and maintain performance records for all employees; and the right to determine the number and starting times of shifts and the numbers and hours of days of work for all employees. [Emphasis added.]

As noted, I disagree with the argument of my colleagues. In the first place, neither the General Counsel nor the Union makes this argument. If the union-party to the contract thought that the clause meant what my colleagues ascribe to it, one would assume that the Union would have so contended.

Second, my colleagues' interpretation would mean that the Respondent had the right to assign unit work to a different company (right to subcontract), but not the right to assign such work to its own supervisors.

Third, although the "right to assign" and the "right to maintain performance records" are in the same clause, they are markedly different concepts. And, grammatically, the phrase "for all employees" is tied only to performance records, i.e., an employer does not assign work "for" all employees.

Thus, the contract supports the Respondent's actions. Concededly, after the contract ended, the Respondent continued to assign unit work to supervisors. Because the contract ended, the Respondent could no longer rely on article 3 to privilege the assignment of unit work to supervisors. Article 31, section 3 makes it clear that this contractual right ended with the contract.[1]

However, it is clear that, as a statutory matter, the status quo continued, even after contract expiration, until impasse or agreement on different terms.[2] In my view, that status quo included the Respondent's right to assign unit work to supervisors. This work assignment was as much a part of the status quo as the employee's wages and benefits. Thus, just as the latter continue as a matter of law after contract expiration, the former continues as well. Accordingly, the Respondent's continued assignment of unit work to supervisors was lawful, even after the expiration of the contract.

I do not believe that *Ironton Publications*[3] requires a different result. That case teaches that a contractual waivier of a right to bargain does not ordinarily survive the expiration of the contract. However, in addition to the fact that I would not apply a "waiver" analysis (see the discussion above), my position does not turn on contract rights. As discussed, it turns on the Act. The assignment of unit work to supervisors was part of the status quo, and, as such, it continued, as a matter of law, until impasse or agreement

Refusal to Bargain on Effects

Contrary to the Respondent, I do not believe that the contract privileged its refusal to bargain about the effects of its decision to close the two facilities. The contract covers the decision but not the effects thereof. Since there is a statutory right to bargain about the effects, and since the contract (under a "contract coverage" analysis) does not take away that right, the Respondent was obligated to bargain about effects. Its refusal to do so was unlawful.

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[1] See my concurring opinion in *Ryder Ate*, 331 NLRB 889 (2000), where I concluded that the employer could not rely on the expired contract to privilege a unilateral change.

[2] *Schmidt-Tiago Construction Co.*, 286 NLRB 342 (1987), *White Oak Coal Co.*, 295 NLRB 567 (1989).

[3] 321 NLRB 1048 (1996).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to bargain collectively with the Union, as the exclusive representative of the employees in the bargaining unit, by unilaterally transferring bargaining unit work which had previously been done by unit employees without bargaining with the Union.

WE WILL NOT fail to bargain in good faith with the Union concerning the effects of the closing of our Hamilton, Ohio facilities, on the employees in the bargaining unit.

WE WILL NOT fail and refuse to timely provide the Union with requested information necessary and relevant to the Union's performance of its function as the exclusive bargaining representative of unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL furnish the information requested by the Union on August 13, 1998; and on request bargain in good faith with the Union as the exclusive bargaining agent of the appropriate unit of employees with respect to the assignment of unit work involving plant closure functions and with respect to the effects on unit employees of our decision to cease operations at our Hamilton, Ohio facilities and, on request, embody in a signed agreement any understanding reached.

WE WILL make whole any unit employees who were deprived of the opportunity to perform unit work during the closing down of our Hamilton, Ohio facilities, for all losses incurred as a result of the unlawful assignment of work, with interest.

WE WILL pay the unit employees who were laid off as a result of our decision to close our Hamilton, Ohio facilities their normal wages when in our employ from 5 days after the date of the Board's decision until the occurrence of the earliest of the following conditions: (1) the date we bargain to agreement with the Union on those subjects pertaining to the effects of the closing of our Hamilton, Ohio facilities; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of our notice of our desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith. In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the unit employees were laid off to the time they secured equivalent employment elsewhere; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in our employ, with interest.

STEVENS INTERNATIONAL, INC.

Eric J. Gill, Esq., for the General Counsel.
Timothy P. Reilly, Esq., of Cincinnati, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Cincinnati, Ohio, on June 4 and 22, 1999. Subsequent to an extension in the filing date, briefs were filed by the General Counsel and the Respondent. The proceeding is based upon a charge filed October 19, 1998,[1] by International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, and its Local Union No. 1688, UAW. The Regional Director's complaint dated January 7, 1999, alleges that Respondent Stevens International, Inc., of Hamilton, Ohio, violated Section 8(a)(1) and (5) of the National Labor Relations Act by using nonbargaining unit personnel to perform unit work following the layoff of the bargaining unit employees, by failing and refusing to respond to the Union's request for information concerning Respondent's operations at its Hamilton, Ohio facility and refusing to bargain about a plant closing agreement concerning its Hamilton, Ohio operations in violation of Section 8(a)(1) and (5) of the Act.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent was engaged in the manufacture, distribution, nd sale of printing presses and machinery in Hamilton, Ohio. It has annually shipped goods valued in excess of $50,000 from its Hamilton location to points outside Ohio and it admits that

[1] All following dates will be in 1998 unless otherwise indicated.

at all times material is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent operated three facilities or plants in the Hamilton area. Plant one was used to assemble the machinery and also for light machining work and offices. Plant three, which is connected to plant one, contained the storeroom and the repair department and the road service crew also worked out of plant three. Heavy machining work was done at plant two as well as some assembly work, storing of parts, and some offices. Heavy assembly work was performed at plant two.

The Union and Respondent were parties to a collective-bargaining agreement that was effective between the dates of July 2, 1994, and December 19, 1997. The contract was extended by the parties through July 19, 1998. Prior to 1998, Respondent has employed between 100 and 200 employees at its Hamilton operations but by the end of June 1998, there were 11 bargaining unit employees working at Respondent's Hamilton plants. On June 30, Respondent notified these employees in writing that they were to be laid off effective July 2. At the time of the layoff, Respondent had sold plant two and unit employees who had been working at plant two had been transferred to plant one. In addition to the normal duties such as shipping and receiving machine parts, the employees began loading and preparing parts, plant fixtures, desks, cabinets, and other plant equipment for shipment to Respondent's corporate facility in Texas. They also continued to inspect parts and then ship them to Respondent's customers and they performed maintenance work as needed.

Paul I. Stevens, chairman and CEO, testified regarding the history of the Company and its recent poor financial condition. The Company began to lose money in 1996 when it had an approximate net worth of $50 million and debts to banks and insurance companies of approximately $60 million. It then implemented a plan to reduce its debt by selling off product lines and divisions but continued to lose money. In 1997–1998 it had an estimated loss of $15 million at its Hamilton operations, it lost $20 million at its Zerand, Ohio facility and had a negative net worth in the $7 to $8 million range.

Business continued to decline but the Respondent was able to continue its Hamilton operations because of one large order. It hoped to receive another large order from an old customer but when it finally learned in June 1998 that the order would go to a competitor from France, the Company decided to close the Hamilton operations. The Company's operations are now consolidated in Texas, where approximately 30 employees work producing products that were never made in Hamilton.

On June 29, the union committee spoke with Bill Kist, Respondent's management official, who informed the Union about the layoff. During this conversation, Union Vice President William Stevison told Kist that there was a good amount of work left to do and asked who was going to do the work. Kist replied by listing some supervisors' names and some of the duties that they would be doing. When Stevison asked Kist who was going to be pulling parts in preparation for shipment, Kist said that the people who were left at the plant and the supervisors would do the work. Thereafter, on July 2, Stevison filed a grievance, which the Respondent denied in a written response dated July 9.

Stevison testified that after his layoff, he and other union members went to the plant on July 20 or 21, and observed that there were many machinery parts that had been moved from plant two to plant one. Stevison further observed that some of the parts that the bargaining unit employees had started putting in crates in preparation for shipment were being moved in preparation for shipment. Stevison then asked Respondent's plant manager, Bob Zeiner, for information concerning the work that was performed after the July 2, 1998 layoff, specifically receiving records, what parts were pulled (in preparation for shipment) and the duties of the management people who were still at the plant. Zeiner replied that he was not going to give the Union the information requested and that Stevison would have to put the Union's request in writing. Stevison then wrote the Union's request for information on a piece of paper and gave it to Zeiner. He was again told that he would not get the information but Zeiner said he would send the written request to the Respondent's office in Texas.

Stevison returned to the plant on August 12 and presented Plant Manager Zeiner with another written request for information which asked for a record of service parts that had been shipped from the Hamilton plants, all sales orders shipped from the Hamilton division, and copies of all records showing parts received by the plant from July 20 to August 12, 1998.

The Union and Respondent had a conference call on August 13, between Hans Kossler, Respondent's vice president, and Ronald Rhine, a union international representative. The Union made several proposals concerning a plant closing agreement, however, Kossler replied in the negative to each proposal made by the Union but made no counterproposals.

Rhine previously had met with Respondent's representatives on July 2, in order to gather information about Respondent's decision to close the Hamilton plants and to try to work out a way to keep the plants open or to negotiate a plant closing agreement. Rhine made specific proposals relating to the extension of insurance benefits for the employees, a severance package and transfer rights for employees, and several other proposals. Rhine also expressed his concern about proper notification from Respondent, as required under the WARN Act. The Respondent said that they would get back with the Union in a week or so but did not.

Thereafter, Rhine wrote a letter dated July 17, reminding Respondent of its earlier agreement to get in touch and he again requested that Respondent meet with the Union to address the issues raised during the earlier meeting. Respondent sent a crossing letter dated July 17, to the Union which stated that Respondent appreciated the opportunity to meet with the Union and stated that it remained open "to address the effect that the closing of the Hamilton plant has had on the employees." As noted on August 13 Rhine participated in a conference call with Kossler and reminded Kossler of Respondent's obligation to negotiate a plant closing agreement with the Union and its obligation to provide the information that the union committee had

originally requested. In response, Kossler agreed that the Respondent had an obligation to sit down with the Union to negotiate a plant closing agreement and told Rhine to send him the Union's proposal for a plant closing agreement. Rhine then drafted a plant closing agreement, which was sent along with an attached written request for the information that the Union had previously submitted to Respondent. The letter, dated August 13, reiterated the Union's request for a meeting with Respondent to negotiate a closing agreement within a week or two. Rhine's letter further stated, "Due to the same operation being in effect after July 19, the Employer and the Union should negotiate an agreement to cover his work, based on the UAW Certification of Bargaining Agent still in effect."

Rhine then received a letter dated August 27, from Constance Stevens, Respondent's vice president of administration, which stated, "We are in the process of evaluating your proposals, in light of our current business situation, and plan to have a response for you in the next two weeks." After the Union heard nothing further, Rhine initiated another conference call and on October 13, Rhine and the union committee spoke with Respondent's representatives, led by Attorney Phil Jones. Stevison asked Respondent's representatives if he could look at or obtain the information that the Union had previously requested (early in the discussion, Jones had replied that he was willing to give the Union the information and Stevison asked Jones if he could go to the plant that day and look in the filing cabinet where the information was stored but Jones replied no.) Stevison again asked if the Union could look at the information in order to process their grievance and Jones, replied by saying, "No." "What don't you understand about no?" Stevison asked Respondent for a copy of the Hamilton product list (needed to determine what bargaining unit work was being performed at the Hamilton facilities) but was told that they did not think they had a product list and Jones stated that because there were not two union jobs left at the facility, there was no union.

Rhine reminded Jones that Respondent had admitted it had an obligation to negotiate a plant closing agreement and to provide information as requested by the Union but Jones told Rhine that Respondent was not going to respond further to the Union. At that point of the conversation, Rhine said that in order to be sure of where the parties were, he wanted to go through the Union's proposals submitted earlier in his August 13 letter one-by-one. Following Rhine's recitation of the Union's proposals, Jones' response for each one "denied" and with respect to whether Respondent would negotiate over the work going on following the layoff, Jones' response was that there had to be two people left in the bargaining unit to have a contract and certification.

Rhine offered to modify the Union's proposals in order to get Respondent to make some counterproposals and suggested that rather than have Respondent provide 1 year's insurance coverage for the bargaining unit employees, as the Union had originally proposed, Respondent would provide only 6 months' insurance coverage. Jones' responded that he was not interested. Rhine also proposed that Jones come to Hamilton to meet with the Union in person to negotiate a contract. Jones declined and replied that it was too expensive for him to travel and meet with the Union.

Discussion

This case does not involve an issue concerning the right of an employer to decide to close its plants but it does involve the legal obligations that flow from that decision and the manner in which the decision was implemented.

Here, there was an effective contract believes the Employer and the Union. The employer was in serious financial condition and had reduced the scope of its operations. It then abruptly laid off its 11 remaining unit employees and proceeded to phase out its existing operations in Ohio while utilizing the services of supervisory personnel who remained on the job to perform some functions that normally had been performed by unit personnel. It did not bargain over this reassignment of unit work, it did not respond to the Union's request for information pertaining to the layoff and the work that subsequently was performed, and it did not make any meaningful response to the Union's request to bargain over a plant closing agreement and the effects of its plant closure decision.

The Respondent attempts to minimize the amount of unit work that was done but it is clear that some such work was done and that the Respondent made a unilateral decision to retain a number of supervisory personnel and to have them do the work that remained. In effect, the employer chose to substitute a supervisor to perform the unit work of some laid off employees. This action involved a mandatory subject of bargaining as it had a clear impact on bargaining unit work see *Land O'Lakes, Inc.*, 299 NLRB 982, 986 (1990).

The Employer kept a log of unit related work that was done (information that was not shared with the Union) and assert that there was never more than 20 hours a week and that it diminished further after September. It then cites *D & B Masonry*, 275 NLRB 1403 (1985), a case involving the construction industry, and asserts that it may unilaterally change terms and conditions of employment where the employer employs one or fewer unit employees. Here, however, the Respondent had a permanent and stable work force comprised of 11 employees who were placed on layoff status. Accordingly, it was not clear that there yet was a condition where there was one or less employees "on a permanent basis" and the issue of performance of the minimal amount of work left open and was susceptible to negotiation. It also appears that the issue of performance of work, left over because of the plant closure, is something that logically comes within the envelope of the concept of the "effect of Employer's closure action and it is clear that the Respondent here did not notify or negotiate with the Union on this matter.

In fact, after the layoff notice on June 30, the Union promptly requested a meeting and met on July 2, the effective date to express its concerns. The Employer then failed to honor its statement that it would think about some things and get back with the Union in a week. Accordingly, I find the Respondent took unilateral action and failed to give the Union timely notice or an opportunity to bargain over its decision to reassign bargaining unit work to nonunit supervisory personnel, a mandatory subject of bargaining, and that by this action and by implementing its decision on July 2, it thereby violated Section 8(a)(1) and (5) of the Act, as alleged.

The Union initially utilized its contractual grievance procedure to notify the Respondent of its bargaining (and information) request and this was followed up by various written and verbal requests that clearly communicated its bargaining demand to the Respondent. On brief, the Respondent asserts its right to unilaterally close its plants. While it may have that right, it also has various attendant obligations, including the notice provisions of the WARN Act as well as the duty to bargain "in a meaningful manner at a meaningful time," with the Union that represents its employees over the effects of the closing. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Otherwise, the Employer's obligation regarding effects bargaining extends to the period after the closing of an Employer's facility, see *Friedman's Express, Inc.*, 315 NLRB 971, 973 (1994).

Here, it is clear that the Employer had been seriously cutting back on employment going from over 100 unit employees in 1997 to 11 at the end of June 1998 and it had sold machinery and made arrangements to sell its plant and other assets prior to its sudden notification on Wednesday, June 3; that it would close the facility 2 days later, on Friday, July 2.

In its defense, the Respondent asserts that it informed the Union of the Employer's poor financial condition and contend that the Union's closure (effects) proposals showed no appreciation of the Employer's financial plight. It then argues that it was in no financial condition to provide economic benefits in any plant closing agreement and was entitled to take a "hard line" on negotiations.

First, it is noted that after the plants closed on July 2, Plant Manager Robert Zeinner remained for 5-1/2 months until he also was laid off in mid December along with two engineer/designers. Nine other supervisors or clericals remained until late September, while five others employees remained thereafter to provide customer service and to administer the closure. Meanwhile, professional liquidators were hired to dispose of assets and their employees were on site to dispose of or prepare equipment for auction. Thus, despite its financial hardship, it chose to retain other employees to aid in plant closing functions and to disposal of assets and it clearly was possible to bargain over an opportunity for unit employees to share at least some part of this as an "effect" of the plant closure. Moreover, the mere fact that an employer may be entitled to take a "hard line on negotiations" does not excuse an employer from preemptively concluding that it could not agree to financially costly union proposal and thereby excuse itself from any bargaining at all. Here, the Respondent made no proposals or counterproposals, it merely rejected each union proposal with a flat "no" and it otherwise refused to participate in any timely or meaningful dialog. It did not negotiate to impasse over the effects of its closure decision; it did not negotiate at all.

The subject of severance pay as well as various other union proposals such as transfer rights to the Respondent's Texas facility and protection regarding possible future resumption of operations are mandatory subjects of bargaining and an element in the "effect" of plant closure. Accordingly, the Respondent has a *First National Maintenance* obligation to bargain and to bargain in good faith. The fact that the Respondent has financial difficulties does not affect this requirement. The exchange of communications and the meetings in which the Union requested bargaining and offered proposals did not reach the level that could be considered to be "meaningful negotiations" and they did not satisfy the Respondent's obligation to affirmatively participate in "effects" bargaining. Here, the Respondent failed to give timely notice of its plant closure decision and it merely stonewalled or put off the Union's request and, accordingly, I conclude that its failure in this regard is a violation of Section 8(a)(1) and (5) of the Act, as alleged, see the *Friedman's Express* case, supra.

It also is well established that as part of its duty to bargain in good faith, an employer must comply with a union's request for information that will assist the union in fulfilling its responsibilities as the employees' statutory representative, *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), and *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979), including information relevant to both contract administration and the processing of grievances, see *Public Service Electric & Gas Co.*, 323 NLRB 1182 (1997). Moreover, and an employer's delay in providing the requested information violates the Act. *Bryant & Stratton*, 321 NLRB 1007, 1015 (1996). Here, any information provided was delayed until it became part of the information provided for the trial in this proceeding. Contrary to the Respondent's contentions, the contract between the parties did not expire with the closing of the plant, and the Employer had a clear duty to bargain with the Union about post-closing unit work. Moreover, it is clear that the Union had a reasonable basis, based upon post closing observations by members of the union at the Respondent's facility, to believe that unit work was still being done. Accordingly, relevancy clearly is established, see *Mabur Energy Corp.*, 295 NLRB 149 (1989). Under these circumstances, I find that the Respondent is shown to have failed at all times to fully satisfy its obligation to bargain in good faith by any timely satisfaction of the Union's information requests and, accordingly, I conclude that the Respondent is shown to have violated Section 8(a)(1) and (5) of the Act in this respect, as alleged.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, and its Local Union No. 1688, UAW is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material union Local 1688 has been the exclusive representative of the relevant unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

4. By failing and refusing to give the Union an opportunity to bargain collectively concerning the employer's decision to lay off all unit employees and to transfer unit work to nonunit supervisors and by implementing its decision on July 2, 1998, and thereafter the Respondent herein violated Section 8(a)(1) and (5) of the Act.

5. By failing to engage in "effects" bargaining with the Union prior to and after closing its Hamilton, Ohio facilities, Re-

spondent has engaged in and is engaging in an unfair labor practice in violation of Section 8(a)(1) and (5) of the Act.

6. By refusing to timely furnish the Union with information requested relevant to the Union's collective-bargaining duties, the Respondent failed to bargain collectively with the Union and engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated the Act by unilaterally assigning bargaining unit work to supervisors without bargaining with the Union, it will be recommended that Respondent make whole unit employees for any loss of earnings they may have suffered because of the discrimination practiced against them by payment to them of a sum of money equal to that which they normally would have earned in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[2]

The Respondent also shall be required to bargain with the Union over the effect of the closing of its Hamilton, Ohio facilities and to furnish the Union with the information (reflected in GC Exh. 13) requested. In view of the Respondent's demonstrated proclivity to ignore its responsibilities under the Act and to insure that it bargain in good faith, the terms of this order "in any like or related manner" shall require the Respondent to timely furnish any other information[3] requested by the Union relevant to bargaining on the issue of the "effects" of the plant closure.

Under these circumstances, it is not considered necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Stevens International, Inc., Hamilton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with the Union as the exclusive representative of the employees in the bargaining unit, by unilaterally transferring bargaining unit work which had previously been done by unit employees, without bargaining with the Union.

(b) Failing to bargain in good faith with the Union concerning the effects of the closing of its Hamilton, Ohi, facilities, on the employees in the bargaining unit.

(c) Failing and refusing to bargain in good faith with the Union by refusing to furnish the Union with requested information necessary and relevant to the Union's performance of its function as the exclusive bargaining representative of unit employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, make timely responses to information request by the Union, and on request bargain in good faith with the Union as the exclusive bargaining agent of the appropriate unit of its employees with respect to the assignment of unit work involving plant closure functions and with respect to the effects on its unit employees of its decision to cease operations at its Hamilton, Ohio facilities and, on request, embody in a signed agreement any understanding reached.

(b) Within 14 days from the date of this Order make whole any unit employees who were deprived of the opportunity to perform unit work during the closing down of the Hamilton, Ohio facilities, for all losses incurred as a result of the unlawful assignment of work, in the manner specified in the remedy section.

(c) Within 14 days after service by the Region, mail to all unit employees employed at its Hamilton, Ohio facilities on June 30, 1998, copies of the attached notice marked "Appendix," on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

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[2] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[3] See *Supervalu Inc. v. NLRB*, 184 F.3d 949 (8th Cir. 1999), involving information relevant to WARN Act information.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules be adopted by the Board and all objections to them shall be deemed waived for all purposes.